Ong Hock Sim F.J. (read by Lee Hun Hoe C.J. (Borneo) delivering the judgment of the Court): The appellant was convicted, on his own plea of guilty, in the High Court in Borneo at Kota Kinabalu on May 23, 1977 on three charges of an offence under section 471 of the Penal Code and punishable under section 465. He was sentenced to a term of two years on each charge, which is the maximum under section 465, but it was ordered that the sentences were to run consecutively. Additionally, he was ordered, after completion of his imprisonment, "to pay Government a fine of $3,000 on each charge ... by monthly instalments of $100 ... in default four months' imprisonment in respect of each instalment." Having pleaded guilty, he can only appeal, as provided in the Criminal Procedure Code, as to the extent and legality of the sentence (section 305).

In so far as the sentence of fine is concerned, we are clearly of the view that it is illegal, as being in contravention of section 283 of the Criminal Procedure Code which enacts: —

"283. (i) Where any fine is imposed under the authority of any law for the time being in force, then, in the absence of any express provision relating to such fine in such law contained, the provisions following shall apply (that is to say) —

(c) the period for which the court directs the offender to be imprisoned in default of payment of fine shall not exceed the following scale —

(1) if the offence is punishable with imprisonment:—

Where the maximum term of imprisonment —	The period shall not exceed —
exceeds six months but does not exceed two years."	six months

Mathematical calculation would indicate that with $9,000 fine to pay by instalments of $100 in default four months for each instalment, the appellant, if unable to pay any, would only be able to atone by serving another 30 years' imprisonment.

At the conclusion of the trial, the learned deputy asked that "the sentence passed be meaningful" and referred to section 426(1)(b) of the Criminal Procedure Code. While "fine" is defined in section 2 to include "compensation adjudged upon any conviction," in our view section 426 refers to a person injured or to the representatives of such person and we do not think that the Government is within the contemplation of the section.

The appellant was unrepresented and admitted his offence. The facts as presented showed a young man of 26 years holding the responsible post of financial clerk to the Ministry of Culture, Youth and Sports earning a nett salary of $370 per mensem. He admitted a previous conviction in March 1977 of an offence under section 468 of the Penal Code involving a sum of $14,260. In his judgment, the learned judge said: "The court was also asked by the prosecution and I have taken into account the outstanding offences." These appear on the record of this appeal. We were somewhat taken aback that two offences so taken into account related to offences committed on January 2, 1975 and January 17, 1975, when the appellant only commenced work with the ministry from March 12, 1975. We were not enlightened by the learned deputy, who was equally, like us, taken aback. Section 171 which provides for other offences provide in subsection (i) that this may be done "with the consent of the prosecutor and the accused" and in subsection (ii) that "the court shall enter or cause an entry to that effect to be made on the record." We regret we could not find such entry on the record.

In all the circumstances, we are of the view, and we do hereby order —

(1) that the fine and sentence in default of payment be set aside; and

(2) that the sentence of two years' imprisonment do run concurrently.

Order accordingly.

LUK KAI LAM v. SIM AI LENG

[F.C. (Lee Hun Hoe C.J. (Borneo), Ong Hock Sim F.J. and Yusoff J.) October 6, 1977 and January 4, 1978]

[Kuching — Federal Court Civil Appeal No. 105 of 1977]

Tort — Slander — Words imputing unchastity or adultery to woman — Actionable per se — Claim of privilege — Malice — Whether necessary for plaintiff to specifically allege malice — R.S.C., 1957, O. 19 r. 22.

Libel and Slander — Slander — Words imputing unchastity or adultery to woman — Defamation Act, 1957 ss. 4 & 5

This was an appeal against the decision of the learned judge of the High Court on the question of slander arising out of a counterclaim. The learned judge found that the respondent had used against the appellant words which were slanderous in that they imputed adultery or unchastity but was of the view that the words were slanderous of the appellant as a woman and not in the way of her profession and office as a staff nurse. Subsequently there was a meeting called with a view to settling matters. At that meeting the appellant made certain slanderous remarks against the respondent imputing unchastity to the respondent. The learned trial judge found the occasion was a privileged one but held that the words were spoken out of malice and the defence of qualified privilege failed. He awarded the appellant $1,500 damages against the respondent and the respondent $1,250 damages against the appellant. The appellant appealed. It was argued *inter alia* (a) the learned trial judge was wrong in holding that the appellant was not slandered in the way of her profession and office; (b) that the words constituting the slander were spoken and published in the presence of a witness; (c) that the learned judge should not have held that the words were spoken out of malice as the respondent had not delivered a reply to the appellant's claim of privilege.

Held: (1) on the evidence the learned judge was right to say that he did not consider the words were calculated to disparage the appellant in her office, profession or calling held by her at the time of publication;

(2) the learned judge saw and heard all the witnesses and he was clearly satisfied that there was publication;

(3) where it is necessary for the plaintiff to prove that the defendant was actuated by an improper motive he need not specifically allege malice in his reply if he has already done so in his statement of claim or if the defendant in his defence has pleaded that he acted in good faith. If the plaintiff has already alleged malice in his statement of claim the proviso to Order 19 rule 22 does not come into play.

Cases referred to:

(1) *Hopwood* v. *Muirson* [1945] 1 All E.R. 453.

(2) *Jones* v. *Jones* [1916] 2 A.C. 481.

(3) *Smith* v. *Lewis* (1917) 142 L.T. 263.

FEDERAL COURT.

T.O. Thomas for the appellant.

J.C. Fong for the respondent.

Lee Hun Hoe C.J. (Borneo): This is an appeal against the decision of the learned judge on the question of slander arising out of a counterclaim.

Certain incidents occurred at the Ting's Nursing Home. Appellant was the resident staff nurse-in-charge and respondent was also a staff nurse at the nursing home. It seems that the staff nurses were not on good terms prior to the incidents. The first incident occurred on March 12, 1975 at about 7.40 a.m. when appellant's son complained to appellant that a staff nurse, Yeo Mong Heng used her knuckle to knock his head. Appellant questioned Yeo about it. Yeo said the boy was a peeping tom. There was an exchange of words resulting in a fight. Appellant telephoned her friend Ling Chit Siang to take her to the police station. Her friend asked her husband Chong Chen Min (PW2) to do so. A report was lodged with the police who came to the nursing home at about 10.00 a.m. the same day to carry out investigations. The second incident which gave rise to the action took place after the police was interviewing Yeo in a room. At that time Chong asked appellant who respondent was. Appellant said "we used to call her Ah Sim." Chong misunderstood this to mean that respondent was an amah as "Ah Sim" meant such in Hokkien dialect. So, appellant explained to Chong that respondent was her colleague and her surname was "Sim". This conversation was said to be conducted in low voice and could not be heard by respondent. However, respondent testified that she heard the conversation. She said in reply to Chong's question appellant mentioned that "this woman is as bad as Miss Yeo." The learned judge believed respondent's version.

Appellant alleged that as respondent was walking past her and Chong respondent uttered these slanderous words about her in the hearing of Chong: "Eh, what is there of you to be proud of? Who does not know that you receive guests upstairs at $50/- a time. Prostitute." Respondent denied saying these words. She said when she heard appellant say she was as bad as Miss Yeo she retorted that the dispute was between appellant and Yeo and did not concern her and that she did not want to get involved. The appellant's story was corroborated by Chong. The learned judge preferred appellant's version. He found the words used by respondent against appellant were slanderous and plainly defamatory in that they imputed adultery or unchastity but was of the view that the words were slanderous of appellant as a woman and not in the way of her profession and office as a staff nurse.

When appellant heard respondent's words respondent alleged that appellant said in a loud voice: "What is there to be proud of? Before getting married you slept with your husband for about a year. Earning only $200/- a month you possess a car and refrigerator. Obviously you have sold yourself to Sia for $50/- a time and to others also for $50/- a time. Hence, you own a car and refrigerator." Sia is the surname of respondent's husband. Respondent answered that her family was rich enough, to which appellant retorted that the house of respondent's family was a wooden one and in a state of collapse. As appellant did not give any evidence to deny the allegation the learned judge accepted respondent's story to be true and found that appellant did utter those words of respondent in the presence and hearing of Chong. But, the learned judge held there was no publication although there was an amah present at the time. This is because the amah is a native and could not understand Mandarin. Further, although Chong was said to be present he did not testify about the utterance.

On March 20, 1975 Dr. Ting (DW3) called the parties involved to a meeting at the nursing home with a view to settling the matters. Yeo apologised to appellant so the matter was closed. However, Dr. Ting was unable to settle the quarrel between appellant and respondent. During the meeting appellant made certain slanderous remarks against respondent. The learned judge found as a fact that appellant had at that meeting said: "Who doesn't know she and Sia had been sleeping in the nursing home for over a year before they got married." He found the occasion was a privileged one. But, respondent swore that there was no truth in those words and that they were made by appellant out of spite. Appellant did not testify in court about the matter. Consequently, the learned judge held that these words were spoken by appellant out of malice and the defence of qualified privilege failed. In the result, he awarded (a) appellant $1,500/- against respondent and (b) respondent $1,250/- against appellant and each party was ordered to pay her own costs. Only appellant appealed.

There are seven grounds of appeal. Respondent pointed out that the first three grounds were merely of academic interest and would not affect the appeal. Appellant conceded that the second and third grounds were so. The first ground is that the learned judge misdirected himself when he applied the pre-1952 English law as stated in *Hopwood* v. *Muirson*[1] and held that appellant was not slandered in the way of her profession and office. Having regard to section 5 of the Defamation Act, 1957 which was extended to Sarawak (see F.L.N. 179/65) he should have held that the defamatory imputation conveyed by the words was such that it would naturally tend to injure the reputation of appellant in her profession and office as nurse-in-charge. Section 4 of the Act provides that:—

"Words spoken and published which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable."

The learned judge referred to this section and said that although no actual damages or loss had been pleaded or proved by appellant he was satisfied that she had brought her case within the meaning of the section. So, he held that the action was actionable *per se*. He then went on to cite *Hopwood's case*[1] where respondent made certain slanderous remarks against appellant, a solicitor, after being shown a reference given by appellant to a third person. In dismissing the appeal the court of appeal supported the learned judge's finding that appellant gave the reference in a personal and not in a professional capacity and that the statement was a slander on the appellant as a man and not in the way of his profession. The slander was upon the solicitor as a man; not upon

the man as a solicitor. There is nothing to preclude the learned judge from relying on the principle in a case to support his view that the slanderous words were not made in a professional capacity. It is true that before the enactment of the English Defamation Act, 1952 it was not slander actionable *per se* to say that a schoolmaster had committed adultery with one of the school cleaners: *Jones* v. *Jones*.[2] By section 2 of the said Act it is now not necessary to allege or prove special damage whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business. But, the court has to look at the facts of the particular case. On the evidence the learned judge was right to say he did not consider the words were calculated to disparage the appellant in her office, profession or calling held by her at the time of publication. The parties were fellow staff nurses and there was evidence to indicate frequent quarrels among the staff nurses. These are matters which must be considered. Also, the generality of and the extravagance of the accusation are elements to be taken into consideration. I accept as correct the contention of respondent that there was only one slander and not two separate slanders as suggested by appellant. The award was made by the learned judge for that particular slander. There is no substance in the first ground.

Regarding the fourth ground appellant maintained that the learned judge's finding that the words "who doesn't know she and Sia had been sleeping in the nursing home for over a year before they got married" were spoken and published in the presence of Miss Yeo was unsupported by evidence. It was argued that there was no evidence to indicate that Miss Yeo heard the first three words and the last four words so that what she actually heard would not be defamatory unless an innuendo was pleaded. The learned judge dealt in some detail with the incident on March 20, 1975 when Dr. Ting was unsuccessful in trying to patch up the quarrel between the parties. In her evidence Miss Yeo testified that appellant said a lot of things and kept on talking until Dr. Ting had to warn her not to make serious allegations. The learned judge saw and heard all the witnesses and came to the conclusion that the words spoken were slanderous and that they were plainly false and made by appellant out of spite. He was clearly satisfied that there was publication. There was no reason for appellant to make such slanderous remarks on that occasion. The fifth ground is merely an expansion of the fourth ground. I find no merit in both grounds.

Paragraph 6 of the Defence and Counterclaim reads:—

"The said words as set out in paragraphs 2 and 3 of the counterclaim were calculated to disparage the defendant in her profession and office as aforesaid. Alternatively and in addition, by the said words the plaintiff meant and was understood to mean that the defendant had been guilty of unchastity and/or generally of a loose character."

The learned judge at page 72 of the Appeal Record stated "In paragraph 6 of the Defence and Counterclaim, the defendant alleges that by the said words, the plaintiff meant and was understood to mean that the defendant had been guilty of unchastity and/or generally of a loose character." Paragraph 6 of course has nothing to do with paragraphs 4 and 5 of the counterclaim. So, the sixth ground complains that the learned judge got himself confused by applying paragraph 6 to paragraphs 4 and 5 of the counterclaim. As there was no innuendo pleaded at all in respect of paragraphs 4 and 5 of the counterclaim the question of attacking it at the trial did not arise. Respondent pointed out that the point was never taken by appellant in the court below during his submission or at any stage of the proceedings. If appellant had pursued the matter seriously respondent said he would have asked for leave to make the necessary amendments before judgment. The absence of pleading paragraphs 4 and 5 along the lines of paragraph 6 above merely prevented respondent from alleging an innuendo. But, that did not prevent respondent from establishing malice which she succeeded in doing and the learned judge held that that destroyed appellant's claim of privilege. It is unsafe to consider merely on a sentence in a lengthy judgment and then say the learned judge was wrong. The whole judgment must be scrutinised as a whole. This ground also fails.

In the seventh ground appellant contended that although the learned judge stated the law correctly he had applied it wrongly to the case as no express malice was pleaded. Appellant made the point that respondent never delivered a reply to appellant's claim of privilege. The learned judge set out the law in his judgment at page 73 as follows:—

"If the judge rules that the occasion is privileged, the defendant must, in order to succeed in the counterclaim, prove that the plaintiff was not using the occasion honestly for the purpose for which the law gave it to her, but was actuated by some indirect or ulterior motive, e.g. malice in the popular acceptation of the term. . . ."

Appellant contended that the learned judge was wrong in applying the law when he said at page 68:—

"Again, since the plaintiff has not gone into the witness box to refute this allegation, I am satisfied that it has been proved as I have come to the conclusion that both the defendant and Yeo were speaking the truth."

The reason appellant said the learned judge was wrong was that respondent and Yeo gave two different versions. Respondent submitted that by pleading privilege the allegation of malice in the statement of claim became an issue. *Smith* v. *Lewis*[3] was cited in support. In that case an action was brought by plaintiff against defendant for damages for libel. The statement of claim alleged that the defendant "falsely and maliciously wrote and published" the words complained of. Defendant pleaded that the publication was made on a privileged occasion. Plaintiff did not deliver a reply alleging express malice. It was contended by counsel for defendant that the allegation of malice contained in the statement of claim was merely formal, and that, as the plaintiff had not delivered a reply alleging express malice the issue of malice had not been raised by the pleadings. On the other hand, it was contended by counsel for plaintiff that the pleading of malice in the statement of claim ceased to be formal as soon as privilege was pleaded, and therefore the issue of malice was raised. Held by Shearman J. that by the defence of privilege the allegation of malice in the statement of claim became an effectual issue, and therefore the issue of malice was raised. In the present case respondent also used the words "falsely and maliciously." Appellant submitted that *Smith's case*[3] was decided in 1917 and

was no more good law. The 1957 White Book, on which our Rules of the Supreme Court are based, shows that the proviso to Order 19 rule 22 was added by R.S.C. (No. 1), 1949. The proviso states that if plaintiff intends to allege that defendant was actuated by express malice he shall deliver a reply giving particulars of facts and matters from which such malice is to be inferred. I should point out the proviso speaks of express malice. Thus, *Mallal's* Supreme Court Practice at page 266 cites *Smith's case*[3] to say where, in order to succeed, it is necessary for the plaintiff to prove that the defendant was actuated by an improper motive he need not specifically allege malice in his reply if he has already done so in his statement of claim or if the defendant in his defence has pleaded that he acted in good faith. The point is that if plaintiff has already alleged malice in his statement of claim the proviso does not come into play. Consequently, the last ground must also fail.

For reasons given, I would dismiss the appeal with costs. The deposit is to be paid to respondent on account of taxed costs.

Ong Hock Sim F.J. and **Yusoff J.** concurred.

Appeal dismissed.

Solicitors: *Thomas & Co.; Reddi & Co.*

LEW VOON KONG & ANOR. v. MUSTAFFA BIN KAMIS

[F.C. (Ong Hock Sim, Raja Azlan Shah and Chang Min Tat F.JJ.) December 3, 1977 and January 9, 1978]

[Alor Star — Federal Court Civil Appeal No. 128 of 1976]

Tort — Negligence — Collision at cross-roads — Apportionment of liability.

In this case an accident occurred at a T-junction between a motor-cyclist which had come out of the side road and a motor car which was proceeding on the main road. The accident occurred at the main road and it appeared that the motor-cyclist on emerging from the side road without stopping had shot across to the other side of the road and into the path of the oncoming car. The collision was head-on. The President of the Sessions Court held both parties equally to be blamed and awarded the motor-cyclist who made the claim $2,125 with costs. An appeal to the High Court was dismissed. The appellants appealed to the Federal Court.

Held: (1) in this case on the facts the blame must be laid entirely at the door of the motor-cyclist;

(2) the learned judge of the High Court had made a mistake on the facts in thinking that the motor-cyclist turned north after he came out of the side road. In such an event there could not have been a head-on collision. But for this mistake it would be doubtful if the learned judge would have upheld the decision;

(3) the findings of the learned President Sessions Court when related to the sketch plan and the photographs established beyond doubt that the accident was the result of the foolish and not merely careless or negligent riding of his motor-cycle by the plaintiff.

Cases referred to:-

(1) *Mohamed Repin* v. *Lim Yu Kee* [1969] 1 M.L.J. 64.

(2) *Hussein & Anor.* v. *Maiden* [1970] 1 M.L.J. 114.

FEDERAL COURT.

N.H. Chan for the appellant.

David C. Alfred for the respondent.

Chang Min Tat F.J. (delivering the judgment of the Court): This appeal is concerned with an accident that occurred at a T-junction, between a motor-cyclist and a motorist. The motor-cyclist had come out the side-road and the accident occurred on the main road.

The case was first heard by the President Sessions Court at Alor Star. He held both parties equally to be blamed and awarded the motor-cyclist who had made the claim, $2,125 with costs that were assessed. An appeal to the High Court was dismissed. The dissatisfied motorist then appealed to this court.

It is reasonably clear that on emerging from the T-junction, the motor-cyclist had turned left towards Alor Janggus and Alor Star, from which direction the motorist was coming. If each had kept to his own side of the road, there would not have been the head-on collision that occurred. Predictably each claimed the other encroached on his side of the road. The motor-cyclist's oral testimony of the accident was that the motorist was overtaking another motor-cyclist travelling in his own direction and because he had encroached on his side of the road, he (the motorist) had run him down. But that was not what the motor-cyclist said in his police report made shortly after the accident. Neither did he make that averment in his statement of claim, though he did allege in his particulars of the motorist's negligence that the motorist was driving on the wrong side of the road.

The motorist said that the motor-cyclist shot out of the side-road without stopping. If the motor-cyclist had kept to his own side of the road and had not encroached on the other (the motorist's) side, the fact that he did not stop at the junction, as alleged by the motorist, would not absolve the motorist from all blame and might well justify the finding of contributory negligence in the proportion as found by the learned President Sessions Court.

On the evidence, the learned President Sessions Court disbelieved the version of the accident as given by the motor-cyclist. He held there was no other motor-cyclist travelling ahead of the motorist. In other words, the motorist was, in his finding, not overtaking anybody and had no reason to travel on the other side of the road. The learned President Sessions Court made a specific finding that the point of impact occurred on the motorist's side of the road, and concluded, as a finding of fact, that "the first defendant's (i.e. the motorist) version of the accident is true and acceptable."

On the law, the learned President Sessions Court found a conflict of judicial decisions. He thought the Singapore case of *Mohamed Repin* v. *Lim Yu Kee*[1] difficult if not impossible to reconcile with *Hussein & Anor.* v. *Maiden.*[2] Both were cases of accidents at cross-roads. In the former, the trial court held the bus-driver who was on the major-road, free from blame. In the latter, the Federal Court of Malaysia upheld the finding of contributory negligence on the part of the motorist who was on the major road and who, in the view of Azmi L.P. "also owed a duty when travelling on a major road to be on the look-out for other users of the road coming out of a minor road and if he failed to do so, he must also be regarded